UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATEMENT OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III its Department of Health, and its Pollution Control Agency

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES: RUSTIC OAKS CONDOMINIUM INC.; and PHILIP'S INVESTMENT CO.,

Defendants.

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

REPLY MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT ON REILLY'S SIXTH AFFIRMATIVE DEFENSE (LACHES)

This reply memorandum is submitted in support of the United States' motion for summary judgment on defendant Reilly Tar & Chemical Corporation's ("Reilly") sixth Affirmative Defense that the United States' claims for relief are barred by the doctrine of laches. In its initial memorandum, the United States argued that Reilly's laches defense fails, because: (1) laches cannot be applied against the United States when it sues to protect a public right or interest; and (2) that facts in this case do not satisfy the requirements for a laches defense, primarily as to the element of prejudice. Reilly's response defeats neither of these assertions. Reilly claims to qualify for an exception to the longstanding protection of public rights from the application of laches and to have suffered prejudice from the United States' timing in bringing suit. However, Reilly fails support these representations.

1. Reilly has not shown that it is entitled to an exception to the general rule that laches is not a defense to an action brought by the United States

Reilly has not established that it is entitled to the benefit of an exception to the principle that laches cannot bar an action brought by the United States to enforce a public right or protect the public interest. Reilly presents three cases which it claims establish exceptions to the United States' laches immunity. These cases, however, granted exceptions under unique factual situations, none of which bear a resemblence of the facts of this case.

The first case Reilly points to is Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885, 891 (8th Cir. 1977), which contains dicta suggesting that laches could be applied against the United States to prevent penalties from accumulating due to delay in bringing an

enforcement action under the Clean Air Act. Reilly overlooks that the circumstances in Lloyd A Fry arose under the unique penalty scheme of the Clean Air Act which is not involved here. Under section 113 of the Clean Air Act, U.S.C. § 7413, EPA's issuance of a Notice of Violation to a source of air pollution triggers the daily accumulation of penalties, starting 30 days after the Notice. In Lloyd A. Fry, Fry was denied pre-enforcement review of a Notice of Violation, and was thus exposed to the increasing penalties prior to the United States' filing suit. Fry was concerned that EPA might delay in filing suit in order to allow the penalties to accumulate. To encourage prompt enforcement and to avoid an "unconscionable accumulation" of penalties, the Eighth Circuit stated that if the Agency delayed in filing the action after the Notice was issued, the defendant could invoke the doctrine of laches to limit the amount of penalties. 554 F.2d at 891. The court's statement cannot be read outside the context of the Clean Air Act's penalty scheme. The Eighth Circuit only indicated that laches might apply to the accumulation of penalties, not to injunctive relief, which is also available to the United States under section 113 of the Clean Air Act. The United States has not claimed that Reilly is liable for daily penalties. The types of relief involved in this lawsuit, injunctive relief and the reimbursement of costs, were not the subject of the Eighth Circuit's attention in Lloyd A. Fry. The limited scope of Lloyd A. Fry makes the court's dicta inapplicable to this case.

Reilly's reliance on Lane v. United States, 633 F.2d 1384 (Ct. Cl. 1980), reh'g denied, 639 F.2d 785 (Ct. Cl. 1981), is similarly misplaced. Lane involved a counterclaim brought by the United States to recoup gratuities paid to former federal employees, who sued for back pay and reinstatement. Two factors influenced the court's making an exception to the United States' laches immunity. First, delay in bringing the counterclaim meant that the United States' case depended solely on tainted documents obtained from the parties who had paid gratuities to the federal employees. Secondly, the court stressed the trivial nature of the United States' claim. The gratuities accepted were petty, consisting of free martinis and greens fees. 639 F.2d at 760. The court also noted that the United States' claim was a counterclaim, initiated after the employees had challenged their employment discharge in court. The Court of Claims saw an "appearance of evil" in the "seeming use of the counterclaim as retaliation for seeking judicial review." 639 F.2d at 761.

None of these elements are present in this action. Reilly is not dependant on tainted documents to make its defense. There is no claim that the United States brought this enforcement action in retaliation against Reilly. And the claims here are not for recoupment of the cost of martinis and greens fees, or other trivial expenses. The United States seeks to remedy an imminment and substantial endangerment to public health and welfare. This is hardly trivial and "a waste of judicial resources" as the Lane counterclaim was viewed. 639 F.2d at 760. The Court of Claims did not intend that their decision carve a general exception into

the United States laches immunity. Just the opposite, the court stated that "[t]his case will remain unique" unless the United States began a habit of bringing claims such as the one in Lane. 639 F.2d at 761. Therefore, the Lane decision is not relevant here.

The third shaky pillar of Reilly's argument is EEOC v. Dresser Industries, Inc., 668 F.2d 1199 (11th Cir. 1982), an employment discrimination suit. Suits by the EEOC are considered to raise private rights of action on behalf of specific employees and therefore are not within the rule which protects the United States from laches when it sues on a public right. United States v. Arrow Transport Co., 658 F.2d at 392, 395 (5th Cir. 1981).*/ However, even if Dresser could be seen as applicable precedent, it would not bar the present suit.

In Dresser, the EEOC brought suit five years after the alleged violations. The Eleventh Circuit stated that its decision invoking laches "in no way prevents the EEOC from filing a current charge, investigating it, and filing a new lawsuit if, as alleged, discriminatory practices are continuing." 668 F.2d at 1200. The United States' action against Reilly was brought precisely because the release of hazardous substances at the Reilly Tar site is continuing. Section 106, 107 Comprehensive Environmental Response and Liability Act of 1980 (CERCLA), 42

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*/ Arrow Transport involved a cost recovery action under the Rivers and Harbors Act for the costs of removing a barge from the Tennessee River. The lawsuit was filed 28 years after the sinking. The Fifth Circuit reversed the district court's dismissal of the action on the basis of laches, restating the Supreme Court's doctrine that laches cannot be invoked against the United States when it sues in its sovereign capacity to protect the public interest. 658 F.2d at 393-941.

U.S.C. §§ 9606, 9607. Under the reasoning in Dresser, the United States' action should not be prevented by laches.

Thus, Reilly failes to justify an exception to the principle stated in Utah Power and Light Co. v. United States, 243 U.S. 389, 409 (1916), that "laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest."

2. Reilly has not shown it suffered prejudice due to the timing of this lawsuit.

Reilly is equally unconvincing when it claims it has suffered prejudice because of the lawsuit's timing. Reilly has had notice of the factual issues in this lawsuit and has been able to prepare its defense since July 1976. In a letter dated July 9, 1976, from Jay M. Heffern to Thomas E. Reiersgord (attached to the Declaration of David Hird), Reilly was notified that the State considered its prior lawsuit against Reilly, State of Minnesota v. Reilly Tar & Chemical Corp., civil no. 670767 (Minn. Fourth Jud. Dist.), still active and was investigating groundwater and soil contamination at the site. This letter predated the enactment of the Resource Conservation and Recovery Act of 1976 ("RCRA") by three months. On April 11, 1978, the State of Minnesota moved to amend its Complaint in the State court action against Reilly to include groundwater claims. The State's motion was filed one and a half years after RCRA's enactment. Since 1976, and at the lastest since April 1978, Reilly Tar has been on notice of these claims and has been preparing its defense to those claims, which are similar to the claims raised in the United

States' action. Thus, Reilly could not have been prejudiced by the fact that the United States did not file its suit until 1980, because it had notice of the States' claims in 1976 and was already preparing its defenses.

Reilly nonetheless asserts that it suffered prejudiced due to the fading memories of witnesses, the loss of documents and the unavailability of key witness.

Reilly points to Mr. George Koonce as a "key" witness who had information relavant to the United States' claims and is now unable to testify. Mr. Koonce, Reilly asserts, would have been able to testify about conditions at the site during the early 1970s. This may be true, but the United States' action is based on current conditions at the site. Mr. Koonce was an employee of the Minnesota Pollution Control Agency. It is doubtful Mr. Koonce had information relevant to the United States claims. Moreover, there are other witnesses available with greater knowledge about site conditions in the 1970's, such as Mr. Herert L. Finch, the former manager of the Reilly plant, who has already been deposed.

Reilly also claims it suffered prejudice through the loss of Mr. Thomas Ryan's testimony. Mr. Ryan, now deceased, was a former president of the company, who was based in Indiana. Mr. Ryan had little personal contact with the site. He would not have been able to testify about conditions at the site which

form the basis of the United States' action. Further, Mr. Ryan died two years after this lawsuit was filed. Reilly argues that Mr. Ryan was in ill-health during those two years. However, Mr. Ryan was not in ill-health in the two and a half years immediately proceeding the filing of this suit when the State suit was reactivated. Indeed, Reilly submitted an affidavit of Mr. Ryan's dated May 8, 1978, in the reopened State lawsuit.*/ Had Reilly considered his testimony vital enough to preserve, Reilly's counsel could have taken Mr. Ryan's deposition at that time, which could have been transferred to this suit as one deposition taken in the State court action has been. It is difficult to see how Reilly is prejudiced by the loss of testimony which the company itself did not consider important enough to preserve through deposition.

Reilly argues that lost documents and fresher memories concerning the sale of the site to the City of St. Louis Park would establish Reilly's defense that the preceding held to issue a National Pollutant Discharge Elimination System permit to the City of St. Louis Park resulted in an adjudication that Reilly is not liable for groundwater and soil pollution by virtue of the fact that it sold the property to the City and entered into a hold harmless agreement.

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*/ This affidavit is attached to the affidavit of Thomas E. Reiersgord of June 21, 1983 submitted to this Court by Reilly in connection with the State's Motion for Summary Judgment on Reilly's First Affirmative Defense.

However, nothing stated in those lost documents, which were never in the possession of the United States, about the scope of the settlement between Reily and the City or the provisions of the hold harmless agreement could relieve Reilly of liability to the United States under CERCLA and RCRA. Indeed, Reilly has already acknowledged before this court that neither the settlement with the City of St. Louis Park or the hold harmless agreement constitute a defense against the claims of the United States, Transcript of Hearing of July 29, 1983 at pp. 4-5. Memorandum Order of August 31, 1983, at 2-3.

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), imposes liability not simply on the current owner of facility where hazardous substances have been disposed, but also on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." CERCLA § 107(a)(1) & (2). Thus, under CERCLA a prior owner of a site may be liable to the United States even though ownership has been transferred. Indeed, former landowners were adjudged liable under section 107 in United States v. South Carolina Recycling & Disposal, Inc., slip op. no. 80-1274-6, at 11-12 (D.S.C. Feb. 23, 1984). Moreover, section 107(e)(1), 42 U.S.C. § 9607(e)(1), further provides that:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section.

Thus, under section 107 of CERCLA, a prior owner of a site remains liable to the United States and the affected State despite any conveyance to a third party or any hold harmless agreement between the former owner and the third party. Courts have construed section 106(a) of CERCLA to apply to the same categories of persons who are liable under section 107. United States v. Outboard Marine Corp., 566 F. Supp. 54, 57 (N.D. Ill. 1982); see United States v. Price, 19 ERC 1635, 1644-46 (D.N.J. 1983); United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1113 (D. Minn. 1982). Courts have also construed section 7003 of RCRA to impose liability on prior owners of sites. United States v. Outboard Marine Corp., supra, 556 F. Supp. at 56-57; United States v. Reilly Tar & Chemical Corp., supra, 546 F. Supp. at 1108.

Thus, any lost documents or faded memories concerning the scope of Reilly's settlement with the City on the hold harmless agreement would have no bearing on Reilly's liability under CERCLA and RCRA. Reilly cannot claim that it is prejudiced in raising its defenses against the United States in this proceeding by lost documents or faded memories concerning these issues.

CONCLUSION

For the foregoing reasons and those stated in the United States' initial memorandum, summary judgment on Reilly's laches defense should be granted in favor of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David Hird, certify that on the 28th day of March 1984, I caused to be served a copy of the foregoing Reply Judgment On Reilly's Sixth Affirmative Defense (Laches) upon the following:

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